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No. 06-

IN THE

Supreme Court of the United States

MINERAL COUNTY, TOWN OF SUPERIOR, ST. REGIS SCHOOL DISTRICT, SUPERIOR SCHOOL DISTRICT NO. 3, MONTANA COALITION OF FOREST COUNTIES, and TRICON TIMBER LLC,

Petitioners,

v.

ECOLOGY CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, or the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B), impose on the U.S. Forest Service a procedural requirement to conduct long-term, on-the-ground research to definitively conclude there will be beneficial effects to wildlife from thinning trees in old growth stands before deciding to conduct such a project to improve forest health, reduce the risk of wildfire and safely reintroduce prescribed fire?

2. Does the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, impose on the U.S. Forest Service a procedural and substantive requirement to collect on-site soil data for every timber harvest unit before it completes the final environmental impact statement?

3. Does the National Forest Management Act, 16 U.S.C. § 1604(g)(3)(B), impose a "mandate to maintain wildlife viability" on the U.S. Forest Service?

PARTIES TO THE PROCEEDINGS

The petitioners in this case are Mineral County, Town of Superior, St. Regis School District, Superior School District No. 3, Montana Coalition of Counties and Tricon Timber LLC. Respondent is the Ecology Center, Inc. The federal defendants in this case are Deborah Austin, in her official capacity as Forest Supervisor for the Lolo National Forest, Abigail Kimbell, Regional Forester of Region One of the U.S. Forest Service, and the United States Forest Service, an agency of the U.S. Department of Agriculture. They are being served as respondents herein.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The only corporate petitioner in this case, Tricon Timber LLC, states that it does not issue shares to the public and has no parent companies.

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Mineral County, Town of Superior, St. Regis School District, Superior School District No. 3, Montana Coalition of Forest Counties and Tricon Timber LLC (collectively "Mineral County") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 430 F.3d 1057. The opinion of the district court (App., *infra*, 40a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2006 based upon an opinion of the court filed on December 8, 2005. App. 38a. A petition for rehearing and rehearing *en banc* was denied on May 8, 2006. App. 54a. On August 1, 2006, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including September 7, 2006. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves three statutes: (1) the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), which authorizes a court to set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," (2) the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and (3) the

National Forest Management Act ("NFMA"), 16 U.S.C. § 1604(g)(3), which directs the Secretary of Agriculture to promulgate regulations:

> specifying guidelines for land and resource management plans developed to achieve the goals of the [Resources Planning Act] Program which — (B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan.

STATEMENT

1. This case arises from Forest Service resource management decisions following wildfires on the Lolo National Forest in Montana that burned approximately 74,000 acres in 2000. App., *infra*, 3a. The Forest Service prepared an environmental impact statement ("EIS") for the Post Burn Project to evaluate salvage and restoration of the burned and unburned areas in the vicinity of the wildfires. *Id.* The Forest Service completed the Final EIS and Record of Decision for the Lolo National Forest Post Burn Project in July 2002. *Id.*

2. As part of the project, the Forest Service decided to salvage burned timber and to treat unburned old growth forest stands by commercially thinning small-diameter trees and

by prescribed burning. *Id.* at 3a; 27a. The objective was to improve the forest health of the old growth stands, minimize the risk the stands would be destroyed by a wildfire, and safely reintroduce prescribed fire. *Id.* at 6a; 27a; 34a-35a. Many of the old growth stands in the project area were threatened by insects and disease and had been destroyed by the wildfires that occurred in 2000. *Id.* at 34a-35a.

3. To evaluate the salvage of dead trees, the Forest Service completed a field sampling of soils in the project area. *Id.* at 18a-19a; 29a. The soils were sampled in areas where the fires had burned, with some samples located inside proposed harvest units and other samples located outside the units. *Id.* A regional soil protection standard precluded ground-disturbing activities where soil disturbance would exceed 15% of a harvest unit. *Id.* at 18a. The Forest Service relied on the field soil samples to conclude that the harvest units currently did not exceed the 15% standard. *Id.* at 22a; 29a-31a. The Forest Service also adopted a mitigation measure that supplemented the field samples and required an on-the-ground examination of the units prior to timber harvest to confirm that the soil standard would be satisfied. *Id.* at 24a-25a; 32a.

4. The district court concluded that "the record demonstrates that the Lolo National [Forest] took the requisite hard look at the impacts of the project on both the animal species at issue, and on old growth and soil conditions." *Id.* at 49a. The Court also noted that:

> The Post Burn Project evaluates current and historical soil conditions on the Lolo National Forest and identifies the predicted impacts of the

> Project on those conditions. FEIS 3-31 - 32; 3-35-48. Further the Forest Service proposed mitigation and monitoring plans to follow up on the results of the project. FEIS 2-36; 2:41-42; 2:61-62.

Id. Finally, the district court concluded that:

> Plaintiff repeatedly disputes management decisions of the Forest Service, including what Plaintiff sees as the Forest Service's misguided fire policy, the Forest Service's approach to old growth habitat management (Br., 8-9), and the LNF's choice of scale for its consideration of soils impacts (Br., 20), among other things. This Court is not in a position to settle scientific disputes.

Id. at 50a.

5. A divided panel of the Court of Appeals reversed. *Id.* at 1a-25a. Judges Fletcher and Gould, writing for the majority, held that the Forest Service was arbitrary and capricious in its decision to thin the small trees from old growth stands to improve forest health, minimize fire risk, and reintroduce fire into those stands through prescribed burning because the agency was not reasonably certain the treatment would not harm old growth wildlife. *Id.* at 6a-12a. The majority characterized the Forest Service's conclusion that the treatments would benefit old growth stands and wildlife as an "unverified hypothesis" that had to be confirmed through clinical trials before the Forest Service could manage the forest in the way it proposed. *Id.* at 9a.

6. In dissent, Judge McKeown criticized the majority's characterization of treating old growth stands as an "unverified hypothesis." *Id.* at 33a. The dissent explained that the Forest Service's assumptions were supported by observational data, *id.*, and further noted that:

> the status quo is anything but stable. The Forest Service presents uncontested evidence that the failure to treat old-growth areas risks the very harms feared by Ecology Center, even though it has provided no evidence to support such a claim. Op. at 16038 ("Ecology Center does not offer proof that the proposed treatment causes the harms it fears. . . ."). In fact, the record reveals that the failure to treat old-growth areas could result in "considerable loss of old growth trees from bark beetle predation," which will put "at risk . . .specific habitat niches for many wildlife species that are adapted to the more open growth old-forest character." Old-growth areas "are now at risk for major disturbances such as disease and insect epidemics and high-severity stand replacing fires." Inaction or delay threatens the species Ecology Center seeks to protect.

Id. at 34a-35a.

8. The majority also held that the Forest Service's assessment of soils using a sample of soil conditions and verification of those conditions on each harvest unit before allowing harvest to proceed did not comply with NEPA. *Id.* at 22a-25a. Instead, the majority concluded that the Forest Service could only satisfy NEPA by field testing the soil in every proposed harvest unit before completing the EIS. *Id.* at 24a-25a.

9. The dissent questioned whether the majority could draw from NEPA an "'on-site soil analysis' doctrine." *Id.* at 32a. The dissent concluded that the Forest Service adequately sampled soils and that the majority improperly required the agency to visit every harvest unit before deciding on a course of action, noting that the majority improperly "changes our posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process." App. 28a.

REASONS FOR GRANTING THE PETITION

This case is about the Ninth Circuit Court of Appeals' overly expansive view of the requirements of NEPA and NFMA. By misconstruing the requirements of NEPA and NFMA, the Ninth Circuit has made it increasingly time consuming, expensive, and difficult for the United States Forest Service to apply its professional expertise and discretion in managing natural resources on the national forests in western states. The Ninth Circuit's application of NEPA and NFMA to natural resource management decisions is particularly important because the Circuit encompasses about 452 million acres of public lands, which represents about 60% of all federally-owned land in the United States.

The Ninth Circuit, more than any other court of appeals, has difficulty applying the APA's deferential arbitrary and capricious standard of review in the context of NEPA. This Court has corrected the Ninth Circuit's expansive view of NEPA's requirements in the past and should do so again. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353-59 (1989) (reversing Ninth Circuit determination that NEPA required an agency to include a fully-developed mitigation plan and a worst case analysis in an EIS); *Marsh*

v. Oregon Natural Resources Council, 490 U.S. 360, 375-77, 385 (1989) (reversing Ninth Circuit determination that an agency's decision not to supplement an EIS was reviewed under a reasonableness standard instead of the arbitrary and capricious standard of review, and also reversing Ninth Circuit determination that the agency erred by failing to supplement its EIS); *Department of Transp. v. Pub. Citizen*, 541 U.S. 752, 124 S. Ct. 2204, 2214-17, 2218-19 (2004) (reversing Ninth Circuit determination that an agency needed to prepare an EIS to consider the environmental effects of Mexican motor carriers entering into the U.S. where the agency lacked discretion to prevent such entry). This Court also has cautioned that even in the context of NEPA, the concept of federalism constrains judicial review because a court cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). Once again, the Ninth Circuit needs to be reminded of the need for constraint.

The Court also should review the Ninth Circuit's conclusion that NFMA imposes on the Forest Service a "mandate to maintain wildlife viability." The term "wildlife viability" is not found in NFMA. Rather, NFMA directs the Forest Service to "provide for plant and animal diversity." 16 U.S.C. § 1604(g)(3)(B). The Ninth Circuit's position is contrary to the Seventh Circuit which has concluded that the diversity provision of NFMA does not establish a substantive standard that elevates wildlife management above management for other resources or that limit the Forest Service's discretion to manage the national forests.

In this case, the Circuit imposed procedural and substantive requirements in the name of NEPA and NFMA that are found neither in the statutes nor their implementing regulations..The decision presents an important federal question about management of the fire-prone forests in the west and conflicts with this Court's opinions which have emphasized that NEPA is a procedural statute that does not dictate substantive environmental results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The end result of the majority's misinterpretation of the law was to place the court in the impermissible role of decisionmaker. The dissent summarized the problem thusly:

> The Ninth Circuit, like other circuits, repeats frequently the legal mantras of administrative review in the context of environmental decisions: "arbitrary and capricious," "hard look," and "no second guessing." These standards are easy to articulate, but it is more difficult to know when we have cross the line from reviewer to decisionmaker. In this case, we have gone too far.

Id. at 26a. The Court's review is warranted to affirm for the Ninth Circuit that it cannot impose additional procedural or substantive requirements not found within NEPA or NFMA as a prerequisite for agency forest resource management decisions.

The Ninth Circuit would have the Forest Service fiddle with analysis having no statutory basis while the national forests of the west burn. The Forest Service wants to thin smaller trees from old growth stands and reintroduce prescribed fire to protect the stands from uncontrolled wildfire which is an increasingly significant threat to the

forests in the west.[1] However, the Ninth Circuit would have the Forest Service conduct clinical trials regarding the effects of such land management before taking action to protect old growth stands. It would take decades for the Forest Service to conduct clinical trials in an effort to determine the "definitive" effects on wildlife of thinning and prescribed burning in old growth stands. *See Daubert v. Merrell Dow*, 509 U.S. 579, 590 (1993) (pointing out that "arguably, there are no certainties in science"). The Forest Service does not have this luxury of time given the imminent threat of wildfire, and neither NEPA nor NFMA demand the "verified

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1. This issue is of profound importance throughout the western United States but of particular import to petitioners, who are from Montana. Montana wildlands are the most at risk to wildfire from changes in climate. Donald McKenzie et al., *Climatic Change, Wildfire, and Conservation*, 18 Conservation Biology 890, 894 (2004) ("Montana is the most sensitive, with a 50-fold increase in mean area burned over the observed range in climate."). Montana currently is suffering through another major fire season, with the Derby Fire alone having burned over 180,000 acres and destroyed 26 homes. *http://www.inciweb.org/incident/440/* (last visited September 6, 2006). In August 2006, the Journal of Science published two articles discussing the increasing threat of major wildfires in association with climate change. Steven W. Running, *Global Warming Causing More, Larger Wildfires?*, 313 Science 927 (2006); A.L. Westerling et al., *Warming and Earlier Spring Increase Western U.S. Forest Wildfire Activity*, 313 Science 940, 943 (2006) ("The overall importance of climate and wildfire activity underscores the urgency of ecological restoration and fuels management to reduce wildfire hazards to human communities and to mitigate ecological impacts of climate change in forests that have undergone substantial alterations due to the past land uses."). The increase in wildfires is undisputed, and reducing stand density to protect old growth stands from such fires is one of the Forest Service's highest priorities. *See generally* Healthy Forest Restoration Act of 2003, 16 U.S.C. §§ 6501-91.

hypothesis" approach as a predicate to resource management as articulated by the majority.[2]

This case also is of national importance because the Lolo Post Burn Project was designed to reduce hazardous fuels in old growth stands in response to the National Fire Plan. Supplemental Excerpts of Record ("SER") 43. The National Fire Plan arose from the devastating wildfire season of 2000 when then-President Clinton directed the Secretaries of Agriculture and Interior to develop a response to severe wildfires and reduce fire impacts on rural communities. A Collaborative Approach for Reducing Wildland Fire Risk to Communities and the Environment, available at *http://www.fireplan.gov/reports/7-19-en.pdf* (last visited September 5, 2006). Congress subsequently directed the Secretaries of Agriculture and Interior to identify communities within the vicinity of federal lands that are at high risk for wildfire. Department of Interior and Related Agencies Appropriations Act 2001, Pub. L. No. 106-291, 114 Stat. 921, 1009 (2000). The Secretaries identified more than 9,000 at-risk communities near federal lands managed by the Department of Agriculture. 66 Fed. Reg. 43384 (August 17, 2001). Among these at-risk communities was petitioner Superior, Montana. *Id.* at 43409. It is vitally important to the communities of the west that the Forest Service not be second guessed by the courts in exercising its discretion to reduce hazardous fuels on the nationals forests.

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2. The Forest Service has a division that conducts forest management research, and the long term effects of fuel reduction are being studied by Forest Service research stations. *See Wildland Fire and Fuels Research and Development Strategic Plan: Meeting the Needs of the Present, Anticipating the Needs of the Future*, Research and Development Publication FS-854, June 2006, available at *http://www.fs.fed.us/research/pdf/Wildland_book.pdf* (last visited September 5, 2006).

1. The Ninth Circuit erred in holding that NEPA and NFMA impose a procedural requirement on federal agencies to complete on-the-ground research in support of natural resource management decisions before taking action.

The majority's nondeferential and distrustful approach to reviewing the Forest Service's land management decisions represents a significant departure from this Court's holding that deference should be at its maximum when reviewing agency decisions involving "an unverified hypothesis" at the frontiers of science. *Baltimore Gas & Elect. Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983) (a reviewing court should "be at its most deferential when the agency is making predictions, within its area of special expertise, at the frontiers of science"). In reviewing the Forest Service's decision to thin dense understory trees to improve forest health, reduce the risk of wildfire, and safely reintroduce fire into old growth stands, the majority imposed a scientific knowledge requirement not found in NEPA, NFMA, or the APA. Citing clinical trials associated with drug studies as an example, the majority contended that the Forest Service must test its theories with on-the-ground research before it can act. App. 9a. *Cf.* App., *infra*, 35a-36a (criticizing the imperfect analogy of drug studies to forest land management) (McKeown, J., dissenting).

The Forest Service based its land management decision for the Lolo Post-Burn Project on the current state of scientific knowledge, particularly focusing on changes in old growth habitat. Although the majority assumed that designated old growth was a static habitat, such that it needed to be preserved from "invasive" Forest Service land management activities, *id.* at 9a-10a, the EIS explained the

Forest Service's reasonable concerns that absent treatment, old growth would be lost to bark beetle attack and high-severity stand-replacing wildfires. *See id.* at 34a-35a (noting that the "status quo is anything but stable," and that the Forest Service had put forth uncontroverted evidence that inaction threatened old growth habitat and associated species) (McKeown, J., dissenting). The Forest Service was not crying wolf, as the burned portions of the project area had lost hundreds of acres of old growth to wildfire. SER 217-19. Even assuming the old growth habitat was somehow impervious to insects or fire, the ponderosa pine, western larch, and Douglas-fir old growth trees in the overstory were being threatened by invasive and competing shade tolerant fir species, a process that would detrimentally alter the character of the old growth stands over time. SER 211-12.

Contrary to the majority's determination that the Forest Service was "altering the composition of old-growth habitat through an invasive process," app. 10a, the Forest Service's objective was not to remove old growth habitat but rather to create, maintain, and improve that habitat. SER 148 ("No live old growth trees . . . would be harvested or cut. *All* live old growth trees would be retained for biodiversity, legacy, and habitat.") (emphasis added). All trees that met old growth criteria in harvest units were to be retained. *Id.* However, the majority ignored the fact that the limited treatment would not convert old growth stands to non-old growth stands.[3] Instead, the majority concluded that the Forest Service should have ignored the various identified threats to old growth,

3. The proposed prescribed fire would have removed most trees less than three inches in diameter while leaving large, older trees intact. SER 239. The proposed thinning would have removed smaller, invasive shade tolerant species while retaining large ponderosa pine, western larch, and Douglas-fir. SER 157.

which as the dissent noted, would have been in itself arbitrary and capricious. App., *infra*, 35a (McKeown, J., dissenting).

The majority believed that the Forest Service's conclusion that prescribed fire and thinning would help create, maintain, and improve old growth conditions was an "unverified hypothesis" pulled from thin air. However, the Forest Service through its annual forest plan monitoring and evaluation had reviewed the beneficial effects of prior timber sales in old growth. SER 41-42. The Forest Service also had conducted a detailed analysis of the effects of treating old growth on other timber sales which demonstrated that thinning and prescribed burning helped restore the forest to an historic old growth structure that was more sustainable and resilient in the face of natural disturbances such as insects and wildfire. SER 693; SER 849-55. In contrast to the Forest Service's evidence regarding the benefits of treating old growth habitat, Ecology Center did not offer a scintilla of evidence that such action harmed old growth or old growth dependent species on the Lolo National Forest. App., *infra*, 7a ("Ecology Center does not offer proof that the proposed treatment causes the harm it fears. . . ."); 34a. Thus, there is no support for the majority's decision to invalidate the Forest Service's factually-supported decision by imposing a NEPA or NFMA procedural requirement of conclusive research prior to agency action.

2. By dictating the timing and extent of field surveys to verify soil conditions, the Ninth Circuit improperly imposed procedural and substantive requirements not found in NEPA.

The majority wrongly concluded that to satisfy the requirements of NEPA, the Forest Service must field verify soil conditions on all harvest units before completion of the EIS. App., *infra*, 22a-25a. Thus, the Ninth Circuit found in NEPA a substantive requirement to field verify soils on every harvest unit, and a procedural requirement to do so before completing the final EIS. The decision conflicts with this Court's precedent holding that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act," *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 548 (1978) (citing *Kleppe v. Sierra Club*, 420 U.S. 390, 405-06 (1976)), and that NEPA imposes no substantive requirements upon an agency. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989).

At issue in this case was the requirement that no timber harvest occur in an "activity area" or harvest unit that exceeded 15% detrimental soil conditions. App., *infra*, 18a. Contrary to the majority's opinion, knowledge of the soil condition of each and every proposed harvest was not necessary for the Forest Service to make a reasoned choice among alternatives about how best to minimize soil disturbance. To avoid timber harvest on any activity area that exceeded 15% detrimental soil disturbance, the Forest Service planned to examine every harvest unit in the project's sale area before commencing timber harvest. App., *infra*, 24a. The majority belittled the Forest Service's approach as a "decision to authorize the Project first and verify later," and

it held that to satisfy NEPA, the Forest Service was required to visit every proposed harvest unit for every alternative considered in the EIS before the EIS was completed. *Id.* at 25a. This holding runs afoul of NEPA for two reasons.

First, the majority's holding established a substantive soil data collection rule not found in NEPA. As the dissent explained, "we are left to conclude that not only does the court of appeals set bright-line rules, such as requiring an on-site, walk the territory inspection, but it also assesses the detail and quality of that analysis – even in the absence of contrary scientific evidence in the record." App. 29a-30a.

Second, the majority improperly imposed a procedural rule that soil data must be collected on all potential harvest units before the EIS is complete. The majority's conclusion that the Forest Service may not "authorize a project first and verify later" is fundamentally at odds with the concept of mitigation under NEPA which allows an agency to adopt measures to avoid an impact by not implementing certain parts of an action. 40 C.F.R. § 1508.20(a). For example, the Forest Service commonly establishes riparian buffers in units to protect streams before implementing timber harvest and delineates the riparian protection zones in the field *after* approval of the EIS but before implementation of the project. The 15% detrimental soil disturbance restriction is essentially a mitigation measure designed to protect soil. Indeed, NEPA's implementing regulations define "mitigation" as "(a) Avoiding the impact altogether by not taking a certain action or parts of an action; (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation." 40 C.F.R. § 1508.20. The panel's decision thus conflicts

directly with the Supreme Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), which cautioned that:

> There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other . . . it would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.

Id. at 352-53. The majority was not free under NEPA to impose on the Forest Service its own view of the appropriate procedural steps to address the impacts on soils. There was no legal infirmity inherent in the Forest Service's procedural approach to survey some areas before the EIS was final, adopt a mitigation measure requiring field verification of the soil conditions on each selected harvest unit, and then follow up with a visit to the harvest units before project implementation.

3. The Ninth Circuit erred in finding that NFMA contains a wildlife viability mandate that transcends the congressionally-declared multiple uses of the national forests, and its decision is in conflict with the Seventh Circuit.

The majority's conclusion that the statutory language of NFMA embodies a viability mandate – one that cannot be satisfied unless the Forest Service definitively determines through research that the effects of removing small trees in old growth forest will benefit wildlife viability – conflicts with NFMA and the decision of the Seventh Circuit Court of Appeals in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995).

The majority erroneously stated that NFMA contains a mandate to maintain wildlife viability:

> In providing for multiple uses, the forest plan must comply with substantive requirements of the Forest Act designed to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the forest. . . ." *Idaho Sporting Congress*, 305 F.3d at 961; 16 U.S.C. § 1604(g)(3)(B). In addition to *the mandate to maintain wildlife viability*, the Forest Service must maintain soil productivity. 16 U.S.C. § 1604(g)(3)(C).

App., *infra*, 6a (emphasis added). *See also id.* at 8a (referring to a viability mandate in discussing the Ecology Center's position that the Forest Service was arbitrary because it was not "reasonably certain that treating old-growth is consistent with NFMA's substantive mandate to ensure species diversity and viability"). The majority then held that because the Forest

Service did not conduct formal research regarding the effects on wildlife of commercial thinning and prescribed burning in old growth forests, the agency's assumptions about the effects of thinning and burning on wildlife were arbitrary and capricious in light of NFMA's supposed viability mandate. *Id.* at 10a-11a.

NFMA's statutory language simply does not contain a mandate to maintain wildlife viability, let alone a viability mandate that trumps all other multiple-use considerations. Rather, the section of the statute referenced in the panel opinion, see *id.* at 6a, merely requires the Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B).[4] Multiple-use objectives include the production of timber.[5]

The NFMA's diversity language in section 1604(g)(3)(B) not only contains no wildlife viability requirement, it also is so qualified that "it is difficult to discern any concrete legal

4. The majority also cited to an earlier Ninth Circuit decision for the proposition that NFMA contains a viability mandate. App. 5a-6a (citing to *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 961 (9th Cir. 2002)). However, a careful reading of that case reveals that in *Rittenhouse*, the Ninth Circuit found a viability "mandate" in a since-eliminated NFMA implementing regulation, not in the statute itself. *Rittenhouse*, 305 F.3d at 961-62 (relying on 36 C.F.R. 219.19 (1999), which provided that "wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area").

5. The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31, imbued the Forest Service with abundant discretion to decide the priorities for management of the national forests.

standards on the face of the provision." Charles F. Wilkinson & H. Michael Anderson, *Land & Resource Planning in the National Forest*, 64 Or. L. Rev. 1, 296 (1985). Further, the majority's discovery of a substantive wildlife viability mandate in 16 U.S.C. § 1604(g)(3)(B) directly conflicts with the Seventh Circuit's interpretation of NFMA, which declined to find a substantive requirement in the statute's diversity provision. *Sierra Club*, 46 F.3d at 620. *See also Glisson v. U.S. Forest Serv.*, 876 F. Supp. 1016, 1029 (S.D. Ill. 1993) (same), *aff'd*, 51 F.3d 275 (7th Cir. 1995). The Fifth Circuit also has addressed the issue, noting that the so-called "diversity mandate itself has been the subject of considerable debate." *Sierra Club v. Espy*, 38 F.3d 792, 801 (5th Cir. 1994). Respectfully, it is time for this Court to resolve this important debate.

More than a decade ago, the Forest Service in a proposal to amend its rule for land and resource management planning on the national forests acknowledged that "the interpretation of the NFMA diversity provision as a goal rather than a concrete standard" was supported by NFMA's legislative history and relevant judicial opinions. 60 Fed. Reg. 18886, 18892 (April 13, 1995). Rather than creating a substantive diversity standard, section 1604(g)(3)(B) directs the Forest Service to "provide for" diversity in order to meet multiple-use objectives. Thus, regardless of whether the majority's wildlife viability holding was premised under the former viability regulation or the statute itself, the majority erred in elevating wildlife viability above all other multiple-use considerations contrary to the explicit language of Congress in the NFMA.[6]

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6. While this Court has held that the Endangered Species Act imposes heightened obligations to protect endangered species, *see generally TVA v. Hill*, 437 U.S. 153 (1978), endangered species were not at issue in the Forest Service's management of old growth habitat, and the Ecology Center advanced no Endangered Species Act claims.

CONCLUSION

The Court should grant Mineral County's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMER 8, 2005

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 03-35995

D.C. No.
CV-03-00018-DWM

ECOLOGY CENTER, INC.,

Plaintiff-Appellant,

v.

DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture,

Defendants-Appellees,

MINERAL COUNTY; TOWN OF SUPERIOR; ST. REGIS SCHOOL DISTRICT NO. 6; SUPERIOR SCHOOL DISTRICT NO. 3; MONTANA COALITION OF FOREST COUNTIES; TRICON TIMBER,

Defendant-Intervenors-Appellees.

Appendix A

Argued and Submitted
February 14, 2005–Seattle, Washington

Filed December 8, 2005

Before: Betty B. Fletcher, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge McKeown

OPINION

B. FLETCHER, Circuit Judge.

Ecology Center, Inc. ("Ecology Center") challenges the United States Forest Service's ("Forest Service" or "Service") Lolo National Forest Post Burn Project ("Project"), which was designed in the aftermath of the 2000 wildfires on the Lolo National Forest ("LNF"). Ecology Center raises a number of procedural and substantive claims under the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"). We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we find that the Forest Service's decision to permit logging in critical old-growth forest and post-fire habitats was arbitrary and capricious, we reverse the grant of summary judgment to the Service and remand.

Appendix A

I

In 2000, wildfires burned approximately 74,000 acres on the Lolo National Forest. While the fires caused considerable damage to the forest, they also created habitat for species that are dependent upon post-fire habitats, such as the black-backed woodpecker.

In response to the 2000 fires, the Forest Service began developing the Lolo National Forest Post Burn Project and preparing the requisite Environmental Impact Statement ("EIS"). The Forest Service considered four alternatives in detail, including a "no action alternative." In July 2002, the Forest Service selected a slightly modified version of "Alternative Number Five" for the Project. This alternative involves, *inter alia*, commercial thinning of small diameter timber and prescribed burning in old-growth forest stands, as well as salvage logging of burned and insect killed timber in various areas of the forest.

On February 7, 2003, Ecology Center filed its complaint, raising several claims under NEPA and NFMA. Ecology Center objects to the Forest Service's decision to permit commercial logging in old-growth forest stands, raising concerns about the impact of such logging on the viability of species that are dependent upon old-growth habitat, such as the pileated woodpecker and the northern goshawk. Similarly, Ecology Center questions the Service's impact analysis of salvage logging in post-fire habitat, particularly with respect to the black-backed woodpecker, a sensitive species. Ecology Center also raises concerns regarding the impact of the Project on soil conditions and questions the reliability of the Service's soil quality analysis.

Appendix A

Ecology Center moved for a temporary restraining order and preliminary injunction, both of which the district court denied. The parties then filed cross-motions for summary judgment. On November 4, 2003, the district court struck extra-record declarations that Ecology Center had included with its motion and granted summary judgment in favor of the Forest Service.[1]

II

"Because this is a record review case, we may direct that summary judgment be granted to either party based upon our

1. In separate proceedings, the Sierra Club challenged the same project at issue here. The district court ruled in favor of the Sierra Club's claim that the Forest Service was required to determine how much sediment affected streams could assimilate before implementing the Project, but ruled in favor of the Forest Service with respect to its analysis of the Project's impact on unroaded areas. In a memorandum disposition decided December 2, 2003, we reversed the district court on both claims: we found that the Forest Service's assessment of the Project's effect on water quality satisfied NEPA, but that its analysis of the Project's impact on unroaded areas was inadequate. *Sierra Club, Inc. v. Austin*, 82 Fed.Appx. 570 (9th Cir.2003). The case was remanded to the district court, and the parties then settled.

The Forest Service moved for this court to take judicial notice of the *Sierra Club* settlement agreement, and for leave to file supplemental information and declarations explaining the terms of the settlement; we granted that motion. After taking judicial notice of the settlement, we invited the parties to advise us as to whether the settlement moots any portion of this appeal or affects the relief, if any, that the district court should grant. Although the settlement significantly reduces the scope of the Project, neither party argues that Ecology Center's claims are moot.

de novo review of the administrative record." *Lands Council v. Powell*, 379 F.3d 738, 743 (9th Cir.2004), *amended by* 395 F.3d 1019 (9th Cir.2005). Our review of agency actions challenged under NFMA and NEPA is governed by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir.1998); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1165 (9th Cir.2003). Under the APA, we review to determine if the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Lands Council*, 379 F.3d at 743.

NFMA imposes both substantive and procedural requirements on the Forest Service. 16 U.S.C. §§ 1600-1687. Procedurally, it requires the Forest Service to develop a land and resource management plan ("forest plan") for each forest that it manages. 16 U.S.C. § 1604(a). Subsequent agency actions must not only comply with NFMA but also be consistent with the governing forest plan. 16 U.S.C. § 1604(i); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 961-62 (9th Cir.2002) ("[A]ll management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the Forest Act. . . ."). NFMA also requires that the Forest Service adopt regulations specifying guidelines for the achievement of NFMA's substantive mandates. 16 U.S.C. § 1604(g)(3).

"In providing for multiple uses, the forest plan must comply with substantive requirements of the Forest Act designed to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the

forest. . . ." *Idaho Sporting Congress*, 305 F.3d at 961; 16 U.S.C. § 1604(g)(3)(B). In addition to the mandate to maintain wild-life viability, the Forest Service must maintain soil productivity. 16 U.S.C. § 1604(g)(3)(C).

Unlike NFMA, NEPA imposes no substantive requirements. Instead, it is designed "to force agencies to publicly consider the environmental impacts of their actions before going forward." *Idaho Sporting Congress*, 305 F.3d at 963. "Agencies must adequately consider the project's potential impacts and the consideration given must amount to a 'hard look' at the environmental effects." *Id.* Specifically, NEPA requires the preparation of a detailed Environmental Impact Statement. 42 U.S.C. § 4332(2)(C). An EIS must "provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

A. "Treatment" of Old-Growth Habitat

The Project involves what the Forest Service characterizes as rehabilitative "treatment" of old-growth (and potential old-growth) forest stands; this treatment entails the thinning of old-growth stands via commercial logging and prescribed burning. The Forest Service cites a number of studies that indicate such treatment is necessary to correct uncharacteristic forest development resulting from years of fire suppression. The Service also points out that the treatment is designed to leave most of the desirable old-growth trees in place and to improve their health.

Appendix A

Ecology Center highlights the scientific uncertainty and debate regarding the necessity, design, and long-term effects of such old-growth treatment. In particular, Ecology Center alleges that the treatment of old-growth forest harms species that are dependent upon old-growth habitat. For example, Ecology Center claims that, even if treatment leaves most old-growth trees in place, it removes or alters other essential elements within old-growth habitat and disturbs bird species currently nesting or foraging within targeted stands.[2] Although treatment may be designed to restore old-growth to "historic conditions," Ecology Center points out this can be a misleading concept: for example, information regarding historic conditions is incomplete; altering particular sections of forest in order to achieve "historic" conditions may not make sense when the forest as a whole has already been fundamentally changed; many variables can affect treatment outcomes; and the treatment process is qualitatively different from the "natural" or "historic" processes it is intended to mimic.

1. NFMA

While Ecology Center does not offer proof that the proposed treatment causes the harms it fears, the Service does not offer proof that the proposed treatment benefits-or at least

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2. For example, the pileated woodpecker is dependent upon old-growth snags (standing dead trees), but treatment involves timber harvesting, which "creates the potential for snag loss." Although the Service acknowledges this danger, it believes that proposed "snag mitigation measures," combined with the potential for snag-creation during the prescribed burning process, will offset most of the snag loss caused by logging.

does not harm-old-growth dependent species. Ecology Center argues that because the Forest Service has not assessed the effects of old-growth treatment on dependent species, the Service cannot be reasonably certain that treating old-growth is consistent with NFMA's substantive mandate to ensure species diversity and viability. As a result, especially given the scientific uncertainty surrounding the treatment of old-growth stands, the Forest Service's decision to treat additional old-growth stands was arbitrary and capricious.

Although the Forest Service points to a report which notes that two species of woodpecker were observed foraging in treated old-growth forest, it does not otherwise dispute the charge that it has not directly monitored the impact of treating old-growth on dependent species. Instead, the Service maintains that it need not do so because (1) it has observed the short-term effects of thinning old-growth stands via commercial logging and prescribed burning on forest composition, (2) it has reason to believe that certain old-growth dependent species would prefer the post-treatment composition of old-growth forest stands, and (3) its assumption that treatment does not harm old-growth dependent species is therefore reasonable. The Service further argues that we must defer to its methodological choices regarding what to monitor and how to assess the impact of old-growth treatment.

An agency's choice of methodology is entitled to deference. *See, e.g., Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1359 (9th Cir.1994). However, there are circumstances under which an agency's choice of methodology, and any decision predicated on that

methodology, are arbitrary and capricious. For example, we have held that in order to comply with NFMA, the Forest Service must demonstrate the reliability of its scientific methodology. *Lands Council*, 379 F.3d at 752 (holding NFMA "require[s] that the hypothesis and prediction of the model be verified with observation"). Here, as in *Lands Council*, the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis. While the Service's predictions may be correct, the Service has not yet taken the time to test its theory with any "on the ground analysis," *id.*, despite the fact that it has already treated old-growth forest elsewhere and therefore has had the opportunity to do so. Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly "treat" more and more old-growth forest without first determining that such treatment is safe and effective for dependent species. This is not a case in which the Forest Service is asking for the opportunity to verify its theory of the benefits of old-growth treatment. Rather, the Service is asking us to grant it the license to continue treating old-growth forests while excusing it from ever having to verify that such treatment is not harmful.

The Service argues that under *Inland Empire Public Lands Council v. U.S. Forest Serv.*, 88 F.3d 754 (9th Cir.1996), we must defer to its decision to monitor only the effect of treatment on forest composition, instead of also monitoring the effect of treatment on dependent species. However, *Inland Empire* is inapposite here. In that case, we

permitted the Service to determine that it was complying with its duty to maintain species viability by using a "proxy-on-proxy" method for monitoring species population. *Id.* at 761. *But see Idaho Sporting Congress*, 305 F.3d at 972-73 (finding use of proxy-on-proxy approach arbitrary and capricious where there is evidence that the "methodology does not reasonably ensure viable populations of the species at issue"). Under the proxy-on-proxy approach, the Service does not ensure that it is maintaining species viability by directly monitoring species populations. Instead, the Service designates certain "management indicator species" as proxies for other species with comparable habitat needs. It then designates certain kinds of habitat as proxies for the management indicator species. Finally, it assumes that a species' viability is maintained so long as the requisite amount of the species' habitat is maintained. Here, the Service is not simply maintaining the amount of old-growth habitat necessary to support old-growth dependent species-it is altering the composition of old-growth habitat through an invasive process.

Although the Service concedes that the opinions of well-qualified experts vary with respect to the appropriateness of management activities in old-growth areas, it also argues that it must have the "discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). However, this is not a case in which different experts have studied the effects of commercial thinning and prescribed burning in old-growth forests and reached different conclusions. Here, experts have

differing hypotheses regarding the effects that treating old-growth has on dependent species, yet the Forest Service proposes to continue treating old-growth without first taking the time to observe what those effects actually are. In light of its responsibilities under NFMA, this is arbitrary and capricious.

2. NEPA

"The EIS did not address in any meaningful way the various uncertainties surrounding the scientific evidence" upon which the decision to treat the Lolo National Forest old-growth rests. *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir.1993). Although the EIS identifies the public's concerns regarding the impact of treatment on dependent species as "key" or "driving" issues,[3] the EIS does

3. In a section of the EIS entitled "Issue Development," the Service describes "[p]otential issues," which are "defined as actual and perceived effects, risks, and hazards of the Proposed Action." Issues were identified both internally and through "public involvement." In relevant part, the EIS states:

> There is a concern that the reduction of canopy closure and stand density caused by fuels reduction activities and commercial thinning may adversely affect habitat for several bird species that are dependent upon late-successional dry forests with closed canopies and high basal area.
>
> . . .
>
> There is a concern that the . . . commercial thinning of unburned trees, and the removal of understory fuels,

(Cont'd)

not actually explain in any detail the bases of those concerns, much less address them. *Cf. id.* (finding NEPA violation where Forest Service failed "to include a full discussion of the scientific uncertainty" surrounding its strategy for maintaining spotted owl viability). The EIS discusses in detail only the Service's own reasons for proposing treatment, and it treats the prediction that treatment will benefit old-growth dependent species as a fact instead of an untested and debated hypothesis. Even if the Service considered these issues but concluded that it need not or could not "undertake further scientific study" regarding the impact of treatment on dependent species, it should have "explain[ed] in the EIS why such an undertaking [wa]s not necessary or feasible." *Id.* For these reasons, we also find that the Service's analysis of the impact of treating old-growth to be inadequate under NEPA.[4]

B. Salvage Harvesting of Black-Backed Woodpecker Habitat

The Forest Service has designated the black-backed woodpecker as a "sensitive species," a species for which

(Cont'd)

> could adversely affect Proposed, Threatened, or Endangered Species and listed Sensitive, Threatened, or Endangered Species . . . known to be present within or to be potential to the analysis area.

4. Ecology Center also raises claims challenging the Service's analysis of the Project's impact on two specific old-growth dependent species, the pileated woodpecker and the northern goshawk. Because we find that the Service's decision to treat old-growth violates both NFMA and NEPA, we do not reach these more narrow claims.

viability is a concern. The black-backed woodpecker's viability is sensitive because it is particularly dependent upon post-fire landscapes, and the combination of fire-suppression efforts and past salvage logging has drastically reduced the amount of post-fire habitat. According to the EIS, "[d]ue to this reduction in habitat, black-backed woodpeckers went from being relatively abundant to relatively rare." To make matters worse, not all fires create black-backed woodpecker habitat, and the burned stands that do qualify only serve as black-backed woodpecker habitat for a limited number of years. As a result, new post-fire habitat must be continuously generated.

Ecology Center and the Forest Service agree that prior to the 2000 fires, there was a critical shortage of black-backed woodpecker habitat. Specifically, the Service estimated that from 1993 to 1998, fires created a total of 11,045 acres of post-fire habitat (9160 of those acres were burned in 1998 alone). This total was estimated to be 6% of what would have been created historically over a comparable six-year period. At that level, the Service considered the black-backed woodpecker and other post-fire habitat dependent species to be "at extreme risk."

Writing in November 2000 about the "effect [on] black-backed woodpeckers," Forest Service scientists explained: "We concluded in 1998 that salvage of any post-fire habitat on the Lolo [National Forest] . . . 'will impact individuals or habitat and with a consequence that the action may contribute to a trend towards federal listing or cause a loss of viability to the population or species.' " They explained that a small amount (less than 400 acres) of salvage could be permitted,

but only *if* there was "a commitment to creation of post-fire habitat of an equal amount" through prescribed fires. Under those two conditions, they believed that salvaging "would not likely . . . cause a loss of viability to the population," even though it "may impact individuals or habitat."

From the EIS, it appears that at the time the Project was developed, there was a total of 19,219 acres of black-backed woodpecker habitat in the Lolo National Forest: there were 9349 acres that were created by pre-2000 fires and were less than five years old, plus 9870 acres of habitat that were created by the 2000 fires. Of those acres, 9100 are located in the Project area. The selected alternative originally proposed salvage harvesting 1020 of those acres. However, the Record of Decision reduced that amount to 815 acres.[5]

The Forest Service maintains that the Project complies with NFMA because the 2000 fires created a large amount of potential habitat, and only a small portion will be salvaged. The Service further points out that the Project includes mitigation measures designed to minimize the adverse impact of salvaging.[6] However, "[r]esearch has also indicated that salvage logging, even when large numbers of snags are left, is detrimental to this species." For example, one study "found

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5. The *Sierra Club* settlement further reduced that amount to 155 acres.

6. For example, the Project provides that no harvesting will occur wherever black-backed woodpecker nests are located; each spring, before harvesting actually begins, targeted stands will be re-surveyed for black-backed woodpecker nests, and loggers will be instructed to preserve any identified nest trees as well as reserve patches surrounding the nesting trees.

that black-backed woodpeckers did not nest in areas that were considered lightly salvaged." In addition, the Project's mitigation measures do not provide for the creation of an equal amount of post-fire habitat elsewhere.[7]

1. NEPA

The EIS fails to adequately explain the basis for the Forest Service's conclusion that eliminating a portion of the newly-created habitat will not adversely affect the black-backed woodpeckers' viability. Prior to the 2000 fires, the amount of post-fire habitat was so low that the black-backed woodpecker and other post-fire habitat dependent species were deemed at "extreme risk," and Forest Service experts concluded that "salvage of any post-fire habitat . . . would . . . impact individuals or habitat . . . with a consequence that the action may contribute to a trend towards federal listing or cause a loss of viability to the population or species."[8] Yet, the Project EIS states-without meaningful explanation-that even though salvaging post-fire habitat may negatively impact individual black-backed woodpeckers, it will "not

7. Although other aspects of the Project involve prescribed burning, "the Lolo prescribed fire program has not demonstrated an ability to recruit large amounts of post-fire habitat, although there is an improving trend in 1997-98." Most kinds of prescribed burning do not create the necessary post-fire habitat; only higher-intensity fires create post-fire habitat. There is no indication that the kind of prescribed burning that the Project entails is designed to create black-backed woodpecker habitat.

8. As noted above, these experts concluded that some salvaging could be tolerated, but only if limited to a small amount and mitigated by the creation of an equal amount of post-fire habitat elsewhere.

likely result in a trend towards federal listing." Without more, this general statement regarding the possible impact and risk involved "do[es] not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380; 40 C.F.R. § 1502.1 (providing that the EIS "shall be supported by evidence that the agency has made the necessary environmental analyses").

We can discern from the EIS only one possible basis for the Service's changed assessment of the impact of salvaging: the fact that the 2000 fires created additional post-fire habitat, which raised the total amount of post-fire habitat. However, we cannot conclude from this fact alone that the habitat level is no longer critically low and that the previously prescribed restrictions on salvaging should no longer be enforced.[9] To be reasonably certain that the post-Project habitat levels would be sufficient to ensure species viability, one must know where the threshold between "critical" and "sufficient" levels of burned habitat lies. Because the EIS does not disclose what this threshold is, much less explain how the threshold was determined, we cannot evaluate the Service's decision. Indeed, we cannot even be certain that the Service determined and considered this factor when making its assessment.

Similarly, the EIS does not indicate how much further habitat levels have to drop before the species is downgraded

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9. We note that the Service considered the creation of 11,045 acres of post-fire habitat over a six-year period to be critically low (6% of the historic rate); thus, the creation of 19,219 acres over a comparable period does not necessarily represent a sufficient increase.

from sensitive to threatened or how the Service plans to generate additional black-backed woodpecker habitat to counter-balance losses from salvaging, the passage of time, and ongoing fire-suppression efforts. Where, as here, "the information in the . . . EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide 'a reasonable, good faith, and objective presentation of the subjects required by NEPA.' " *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir.1988) (quoting *Johnston v. Davis*, 698 F.2d 1088, 1095 (10th Cir.1983)), *amended by* 867 F.2d 1244 (9th Cir.1989); *see also Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir.1998) ("[A]llowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.").

Thus, we hold that the Forest Service failed to either adequately explain its impact assessment or provide the information that is necessary to understand and evaluate the Forest Service's decision to permit salvaging of the black-backed woodpeckers' rare habitat, in violation of NEPA.

2. NFMA

The designation of a species as sensitive arises from the Forest Service's obligations under NFMA. Pursuant to

16 U.S.C. § 1604(g)(3)(B), the Forest Service is required to "provide for diversity of plant and animal communities." The Forest Service's duty to maintain viable populations "applies with special force to 'sensitive' species." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 n. 2 (9th Cir.2000) (citation and quotation omitted). The Lolo National Forest Plan requires, more specifically, that the Forest Service "manage to maintain population viability" for plant and animal species "that are not threatened or endangered, but where viability is a concern (*i.e.*, sensitive species)."

Because the Forest Service failed to provide the factual basis for its analysis and failed to adequately explain its decision, we cannot be reasonably certain that the salvaging-which the Service concedes may harm individual black-backed woodpeckers-will not jeopardize the black-backed woodpeckers' viability. *Cf. Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir.2005) (finding NFMA violation where "we cannot reasonably determine that the Forest Service has complied with the [Forest] Plan"). We therefore hold that the decision to salvage harvest black-backed woodpecker habitat is also arbitrary and capricious under NFMA.

C. Soil-Quality Analysis

Ecology Center next challenges the Forest Service's soil quality analysis. Under the applicable Regional Soil Quality Standard, the Forest Service cannot allow an activity that would create detrimental soil conditions in fifteen percent of the activity area.[10] Ecology Center claims that the

10. An "activity area" is a unit of forest in which an activity, in this case salvage harvesting, is to take place; this Project proposes (Cont'd)

methodology the Forest Service used to determine what percentage of soil is in a detrimental state in each activity area was insufficiently reliable because the Service estimated soil conditions on the basis of maps, samples from throughout the Forest, aerial reconnaissance, and computer modeling, but did not verify those estimates by directly observing soil conditions in the activity areas.[11]

We addressed a nearly identical claim, involving the same Regional Soil Quality Standard, in *Lands Council.*[12]

(Cont'd)

harvesting in approximately 128 different activity areas or "cutting units." The Regional Soil Quality Standard further provides that if fifteen percent or more of the activity area already has detrimental soil conditions, then the Project will not be permitted to make it worse. Rather, the Project should then aim to improve the soil conditions.

11. Specifically, the Service looked at maps to determine where damaging past activities (*e.g.*, timber harvesting), jammer roads, firelines, and skid trails, as well as areas of high soil burn severity overlap with proposed activity areas. In addition, the Service input data from the Land Systems Inventory ("LSI") and the Burned Area Emergency Rehabilitation Report ("BAER Report") into models to generate estimates of the project's possible effects. The BAER Report was based on field reviews and helicopter flyovers, as well as "transect surveys" (an approved method of field observations). The LSI and BAER Report data was not collected for the purpose of determining compliance with the Regional Soil Quality Standards. Because the Project was developed after the BAER transect surveys were conducted, the transects did not cover the vast majority of the activity areas; only a few were crossed by coincidence.

12. Because *Lands Council* was decided after briefing, we ordered supplemental briefing.

See Lands Council, 379 F.3d at 752-53. In that case, "based on samples from throughout the Forest, and aerial photographs, the Forest Service estimated the quality of the soils in the Project area using a spreadsheet model." *Id.* at 752. We held that the "Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA." *Id.* at 752-53. In so holding, we relied on the analysis of an earlier district court case, *Kettle Range Conservation Group v. U.S. Forest Serv.*, 148 F.Supp.2d 1107 (E.D.Wash.2001), where the Forest Service, "based on assumptions [from general data from the Forest soils], geological maps, and aerial photographs, . . . *estimated* the condition of each unit, tried to determine which units *might* exceed established standards, and *projected* potassium levels." *Id.* at 1127 (emphasis in original).

Although the methodologies in this case, *Lands Council*, and *Kettle Range* all appear to suffer from the same critical defect, the Forest Service argues that *Lands Council* is not controlling here. Specifically, the Service argues that the Regional Soil Quality Standard is not binding with respect to projects in the Lolo National Forest. In addition, the Forest Service argues that this case is factually distinguishable from *Lands Council* because, notwithstanding the non-binding nature of the Standard, the Forest Service completed sufficient on-the-ground verification of its soil quality estimates. We address each argument in turn.[13]

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13. The Forest Service also reiterates its argument that this court must defer to its choice of methodology and reliance on its own experts. This argument fails here for the same reason it did in *Lands*

(Cont'd)

Appendix A

1. The Regional Soil Quality Standard

The Forest Service argues that the Standard is not binding because it was never incorporated into the Lolo National Forest Plan, and although it was incorporated into the Forest Service Manual, this court has held that the Forest Service Manual does not have the independent force and effect of law. *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir.1996).

Even assuming, *arguendo*, that the Standard does not have the independent force and effect of law with respect to the Lolo National Forest, it would nonetheless be arbitrary and capricious for the Forest Service to ignore it because both the draft EIS and final EIS discuss the Standard as if it is binding and claim that the Service developed the Project in compliance with its provisions. Thus, even if we were to agree that the Standard is merely advisory, we would then be compelled to find that the draft EIS and final EIS are misleading in violation of NEPA. *See Resources Ltd. v. Robertson*, 35 F.3d 1300, 1304 n. 3 (9th Cir.1994) (rejecting the argument that the Forest Service could treat the

(Cont'd)

Council: although this court is required to defer to agency expertise, the agency is not permitted to adopt and rely upon a methodology without reasonably verifying its reliability. *Lands Council*, 379 F.3d at 752 ("The Forest Service, granted appropriate deference, still does not demonstrate the required reliability of the spread sheet model.") Moreover, in this case, one of the Forest Service's own experts, Region Scientist John Nesser, called the Forest Service's soil analysis into question because it failed to assess soil conditions by field testing the actual activity areas-the exact reason that *Lands Council* deemed the Forest Service's methodology inadequate.

Interagency Grizzly Bear Guidelines as optional where the Fish and Wildlife Service made its "no jeopardy" conclusion contingent on adherence to the Guidelines); *Animal Def. Council*, 840 F.2d at 1439 (noting that a misleading EIS violates NEPA). Moreover, the purpose of the Standard is to ensure compliance with the substantive mandates of NFMA. The Forest Service does not explain how it can be certain that the Project complies with NFMA if the Project was not developed in accordance with the Standard.

2. On-Site Verification of Soil Conditions

First, the Service points to the transects it conducted during the BAER assessment of the 2000 fires' aftermath. However, during the Project development, one of the Service's own experts pointed out that the transects targeted burned areas, not proposed harvest units; as a result, most of the activity areas were *not* transected.[14] Thus, the BAER transects do not distinguish this case from *Lands Council*, where the Service similarly "did not test much of the activity area." *Lands Council*, 379 F.3d at 752, *as amended by* 395 F.3d at 1034.

Second, the Forest Service argues that its soil analysis is nonetheless sufficiently reliable because it utilized data from areas with ecological characteristics similar to the proposed harvest units. *Lands Council* expressly rejected this

14. This point is corroborated by the draft EIS, which states that "not all proposed harvest units were visited with line transects" and that "much of the [soil quality] determination was based on information from the transportation and timber shop with respect to past activities and regeneration level of the jamer [sic] roads."

same argument. *Id.* ("The Forest Service concedes that it did not test much of the activity area, but argues that because it tested similar soils within the Forest, and similar soils act the same way, then the methodology is sound."). We note that comments on the Project by the Service's own expert support this holding: Region Scientist Nesser argued that the Service's conclusions regarding soil conditions in the activity areas were "not credible" because the Service did not test the activity areas themselves, as the Standard requires.[15]

Third, the Service points to some informal field reports contained in the record, some of which indicate that a small percentage of the activity areas were observed directly.[16] The record provides little information that enables us to assess

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15. Specifically, Region Scientist John Nesser commented:

> The statement on page 3-35 [of the draft EIS] *that 'All proposed activity units are at 3 percent (detrimental disturbance) or less prior to any new activities'* is not credible, given fire effects and the effects of past timber harvest and road building activities. This is because transects were done in the various burned areas, rather than in proposed harvest or other activity units. The burned units are not the correct activity unit to use for post fire activities. . . . statements about meeting the 15 percent limits for detrimental disturbance are both irrelevant and wrong. Without using the correct activity areas for analysis, the cumulative effects assessment is not correct.

16. Some of the field reports cited by the Service actually say very little about soil conditions.

the reliability or significance of these reports; for example, we do not know the qualifications of the persons conducting the field review, the methodology utilized, or whether the field observations confirmed or contradicted the Service's estimates. Moreover, the final EIS repeatedly explains that the Service will conduct field testing to verify its estimates prior to any ground-breaking activities,[17] and there is no indication in the draft EIS or final EIS that the Forest Service actually consulted and relied upon any of the field reports it now cites when it was making its selection amongst the Project alternatives. Thus, we cannot conclude that these reports distinguish this case from *Lands Council.*

Finally, we consider whether the Service's plan to verify soil conditions in the activity areas after authorizing the Project, but before actually commencing harvesting activities, satisfies NFMA and NEPA. The fact that the Service plans to conduct on-site verification prior to any harvesting implies that even the Service recognizes that its soil-quality estimates need to be verified. Thus, we conclude that the Forest

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17. The final EIS explains that a "[w]alk through of the proposed harvest and burn units *will* be completed prior to the implementation of any ground disturbing activities in the activity units. The walk through *will identify the occurrence and percent of the activity area* with displacement, rutting, compaction, high burn severity, depth of organic matter, pedestaling, and slumping." (emphasis added). Similarly, throughout its discussion of the Project's impacts, the EIS repeatedly notes that it "will verify" the conclusions it reached regarding soil conditions by having "qualified soil specialists" conduct "field reviews" of the proposed activity units "to evaluate the percent detrimental condition prior to any ground disturbing activities."

Service's decision to authorize the Project first and verify later does not distinguish this case from *Lands Council*, and that the Project violates NFMA. We also conclude that the Service's plan to verify its estimates post-decision fails to satisfy NEPA, because "NEPA requires consideration of the potential impact of an action *before* the action takes place." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380 (quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir.1990) (emphasis in original)); *Kettle Range*, 148 F.Supp.2d at 1127 ("They [the Forest Service] apparently planned to [field test] sometime in the future. They should have done it before they completed the FEIS. The failure to do so is a violation of NEPA because it shows that USFS did not give a 'hard look' at the effects of the Project on the soils in the analysis area.").

III

The Forest Service's selection of Modified Alternative Number 5 for the Lolo National Forest Post-Burn Project violates both NEPA and NFMA. We reverse the district court's summary judgment in favor of the Forest Service, and direct the district court to enter summary judgment on behalf of Ecology Center. We remand this case to the Forest Service for further proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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18. We do not reach the evidentiary issue: whether the district court abused its discretion in excluding the extra-record expert declarations. We note that, in the course of the preparation of a new EIS on remand, the parties may submit the declarations and any other relevant information to be included as part of the administrative record.

Appendix A

McKEOWN, Circuit Judge, dissenting:

The Ninth Circuit, like the other circuits, repeats frequently the legal mantras of administrative review in the context of environmental decisions: "arbitrary and capricious," "hard look," and "no second guessing."[1] These standards are easy to articulate, but it is more difficult to know when we have crossed the line from reviewer to decisionmaker. In this case, we have gone too far.

As summarized in *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1376 (9th Cir.1998), we review agency actions "to determine if they were arbitrary or capricious, an abuse of discretion, or not in accordance with law." The limited nature of this inquiry underscores the latitude in implementation and interpretation that Congress intended for its agents. This latitude does not relieve us of our duty to insure that the agency took a "hard look," as required under the National Environmental Policy Act ("NEPA"), or to insure compliance with forest plans under the National Forest Management Act ("NFMA"). Nor does record review mean that we abdicate our obligation to

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1. *See, e.g., Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir.1998) (noting that we review Forest Service actions under the APA and the National Forest Management Act to determine if they were "arbitrary and capricious"); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir.2002) (requiring a "hard look" by agencies at environmental effects of projects); *Idaho Sporting Cong., Inc. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir.1998) (noting that courts should not "second guess[ ] an agency's scientific conclusions" and, for that reason, requiring hard data to discourage second guessing).

scrutinize the agency's underlying data, assumptions, and conclusions. As a reviewing court, we play a critical role in the review process and we have not been shy in letting the U.S. Forest Service know where it has fallen short as a matter of law and process.[2] However, the majority's extension of *Lands Council v. Powell*, 379 F.3d 738 (9th Cir.2004), amended by 395 F.3d 1019, 1024 (9th Cir.2005), represents an unprecedented incursion into the administrative process and ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service. Because the majority has, in effect, displaced "arbitrary and capricious" review for a more demanding standard, I respectfully dissent.

The project under review is designed to address the aftermath of the Lolo National Forest wildfires in Montana in 2000 through selected thinning of smaller timber, salvage of timber, prescribed burning and regeneration of thousands of acres. The administrative record in this case is huge-a 1900+ page Final Environmental Impact Statement (FEIS), 150 detailed maps and 20,000 pages of background information. The majority highlights only parts of this record, criticizes the qualifications of the Forest Service's personnel, and questions various scientific judgments. In faulting the Forest Service's soil quality analysis and concluding that old-

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2. *See e.g. Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 816 (2005) (holding that the Forest Service's timber sale plan was arbitrary and capricious, and violated NEPA, because it was based on a clear misinterpretation of data on market demand for the timber); *Idaho Sporting Cong. v. Thomas*, 137 F.3d at 1154 (holding that a Forest Service plan violated NEPA because it had failed to take a "hard look" at the environmental effects of the proposed timber sale).

growth forest will not be impaired, the majority changes our posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process.

My concern is perhaps best illustrated in the majority's application of *Lands Council* to the soil quality analysis issue. In *Lands Council*, we addressed the Forest Service's analysis of disturbed soil conditions in a watershed restoration project in the Idaho Panhandle National Forest. The Forest Service had taken soil samples from throughout the forest but not in the activity area. *Id.* at 1035. Based on these samples and aerial photographs, it calculated the impact of the watershed restoration project on soil quality in the activity area. *Id.* at 1034.

In *Lands Council*, we rejected the Forest Service's choice of scientific methodology because it did not walk or test soil in the activity area. *Id.* We concluded that the "Forest Service's reliance on the spreadsheet models, unaccompanied by on-site spot verification of the model's predictions, violated NFMA." *Id.* at 1035. Given the specific record and circumstances in *Lands Council*, this resolution may have made perfect sense. But in the abstract, without the ability to compare the record in *Lands Council* with the record here, there is no legal basis to conclude that the NFMA requires an on-site analysis where there is a reasonable scientific basis to uphold the legitimacy of modeling. NFMA does not impose this substantive requirement, and it cannot be derived from the procedural parameters of NEPA.

Appendix A

Application of *Lands Council* makes even less sense in this specific case. Here, the Forest Service conducted exactly the kind of on-site analyses found lacking in *Lands Council*-soil samples in activity areas. The record lists five activity areas surveyed in soil sample transects and details the walkthrough of a number of activity areas. The majority concedes that these on-site analyses exist but criticizes them for being too few and of poor quality.[3] Resting on this characterization, the majority rejects the Forest Service's soil analysis on the ground that it was " *nearly* identical" to the one we found lacking in *Lands Council.*

Lands Council makes compliance with NFMA and NEPA a moving target. If one reads *Lands Council* to require on-site analysis in every case, which I respectfully suggest is an over-reading of the case, the circumstances here comply with that dictate. Yet the majority now says, without support in the record and absent a challenge by Ecology Center at the administrative level, that the on-site analysis was insufficient and that we do not possess enough information to know if the inspectors were qualified. From this judgment, we are left to conclude that not only does the court of appeals set bright-line rules, such as requiring an on-site, walk the territory inspection, but it also assesses the detail and quality

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3. *See* Op. at 1069 n. 11 (finding the Forest Service's soil transects "did not cover the vast majority of the activity areas; only a few were crossed by coincidence"); *see, e.g., id.* at 1070 ("The record provides little information that enables us to assess the reliability or significance of these reports; . . . we do not know the qualifications of the persons conducting the field review, the methodology utilized. . . ."). To paraphrase an old joke, the majority found the food terrible and the portions small.

of that analysis-even in the absence of contrary scientific evidence in the record. Page after page of the record contains details on field analysis, such as the following representative sample of an evaluation form:

* * *

Appendix A

In my view, it is not our role to criticize this evaluation because, for example, the form does not list the evaluator's qualifications. Nor are we in a position to unscramble and pass judgment on the investigator's field notes, as in the following excerpt, which are summarized and integrated into the FEIS:

Had Ecology Center offered a credible scientific critique of this methodology or provided some other basis for us to determine whether the Forest Service's judgment was arbitrary and capricious, we would be in a different position. But just as we are not supposed to substitute our judgment for that of the Forest Service, neither can we rely on-in the absence of evidence-Ecology Center's arguments in its briefs or in its expert declaration filed *after* the administrative review process.

Lands Council does not direct us to assess the sufficiency of the Forest Service's on-site soil quality analyses beyond the traditional arbitrary and capricious standard; it only asks us to verify that there is such an on-site sampling. That opinion stated four times that the Forest Service had failed to conduct *any* on-site analysis-it did not say that the Service failed to conduct *enough* of them.[4] The majority now extends the "on-site soil analysis" doctrine, initiated by *Lands Council*, while abandoning its reasoning. Although on-site analysis could plausibly be conducted in such a manner as to be arbitrary and capricious, the majority's justification for finding *this* project to be arbitrary and capricious imports a bright-line rule where individualized analysis is appropriate.

More importantly, in *Lands Council* we did not purport to create a general rule requiring on-site verification for all

4. *See id.* at 1034 ("The Forest Service did not walk, much less test, the land in the activity area."); *id.* at 1035 ("The predictions of the model . . . were not verified with on the ground analysis."); *id.* ("[T]he spreadsheet models, unaccompanied by on-site spot verification . . . , violated NFMA."); *id.* (The "soils analysis was based *entirely* on the model with *no* on-site inspection . . . .") (emphasis added).

scientific hypotheses adopted by the Forest Service regardless of context. We did not even adopt a rule requiring all soil analyses to be verified by on-site sampling. Our decision was specific to the facts of that case. *See Lands Council*, 395 F.3d at 1035 ("*Under the circumstances of this case*, the Forest Service's . . . methodology, to be reliable, required that the hypothesis and prediction of the model be verified with observation.") (emphasis added).

Nevertheless, the majority generalizes the "unverified hypothesis" principle articulated in *Lands Council* beyond the soil analysis context to other scientific findings made by the Forest Service. In so doing, the majority demonstrates the dangers of extending a reference-abstracted from a single, technically detailed, fact-specific decision-to unrelated factual contexts. For example, regarding the old-growth claim, the majority reverses the Forest Service's judgment because "[h]ere, as in *Lands Council*, the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis." Op. at 16039. The Forest Service hypothesis is, however, supported by observational data. There is record evidence, based on direct observation, that treatment produces and preserves habitat for old-growth dependent species.[5]

The majority applies *Lands Council* to prohibit the Forest Service from inferring simply that because treating old-

5. For example, a report by Forest Service scientists utilized historic and stand structure research to plan for treatment that would enhance habitat for plants and species. The scientists found that treated areas have nesting and foraging opportunities for cavity nesting species such as pileated woodpeckers.

growth preserves or creates habitat for dependent species does not mean that such treatment will not harm the species. Op. at 1064 (claiming that the Forest Service just "assumes that a species' viability is maintained so long as the requisite amount of the species habitat is maintained"). In reaching this conclusion, the majority acknowledges and then dismisses without explanation the very record evidence it says the Forest Service failed to provide-here, direct observation of certain species seen foraging in old-growth areas after treatment.[6]

Applying *Lands Council* to the old-growth issue is inappropriate for yet another reason. The panel assumes that Alternative 5, which involves thinning, salvage, and regeneration, disrupts a stable status quo "through an invasive process." Op. at 1064. Yet the status quo is anything but stable. The Forest Service presents uncontested evidence that the failure to treat old-growth areas risks the very harms feared by Ecology Center, even though it has provided no evidence to support such a claim. Op. at 1064 ("Ecology Center does not offer proof that the proposed treatment causes the harms it fears. . . ."). In fact, the record reveals that the

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6. The majority fails to acknowledge that we "have, in appropriate cases, allowed the Forest Service to avoid studying the population trends of [species] by using . . . habitat as a proxy for . . . population trends." *Lands Council*, 395 F.3d at 1036. In *Lands Council*, we rejected a proxy-on-proxy approach for measuring population trends in old-growth forest because the habitat data the Forest Service offered was "fifteen years old, with inaccurate canopy closure estimates, and insufficient data on snags." *Id.* The majority does not identify any such problems in using the proxy-on-proxy approach in this case. *See* Op. at 16040.

failure to treat old-growth areas could result in "considerable loss of old growth trees from bark beetle predation," which will put "at risk. . . specific habitat niches for many wildlife species that are adapted to the more open growth old-forest character." Old-growth areas "are now at risk for major disturbances such as disease and insect epidemics and high-severity stand replacing fires." Inaction or delay threatens the species Ecology Center seeks to protect.

No one contests the Forest Service's conclusion that treatment will "provide direct reduction of bark beetle infestation or risk of future infestation." Faced with uncontroverted evidence that inaction may harm old-growth areas, the majority still requires the Forest Service to produce more evidence that treating old-growth will not harm dependent species before it will allow the Service to save old-growth areas from other dangers. Under these circumstances, I cannot agree that the Forest Service's decision to treat old-growth areas was arbitrary and capricious. Indeed, had the Forest Service taken the majority's approach, its decision may well have been arbitrary and capricious for "fail[ing] to consider an important aspect of [the] problem." *See Lands Council*, 395 F.3d at 1026.

Nor do I think it appropriate to analogize the Forest Service process to the separate and wholly inapposite regime of the Food and Drug Administration ("FDA"). The majority writes that "it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial" just as the Forest Service cannot be permitted to "treat more and more old-growth forest without first determining that such

treatment is safe and effective for dependent species." *See* Op. at 1064. Without commenting on the obvious differences between humans and trees (and in fact acknowledging the importance of both to our environment), this analogy underscores the degree to which the majority inserts itself into the internal judgments of the Forest Service. The FDA process dictates a substantive and specific administrative course of action in terms of clinical trials and other requirements as a prelude to the approval of drugs and medical devices. Neither NEPA nor NFMA serve that function in the environmental context. To import the notion of clinical trials from the FDA context to soil sampling in federal forests is a leap too far.

Apparently we no longer simply determine whether the Forest Service's methodology involves a "hard look" through the use of "hard data," but now are called upon to make fine-grained judgments of its worth. In reaching this conclusion, the majority takes aim at two firmly established lines of precedent in administrative law. First, this view is contrary to the basic principle that we reverse agency decisions only if they are arbitrary and capricious. This standard of review does not direct us to literally dig in the dirt (or soil, as it were), get our fingernails dirty and flyspeck the agency's analysis. Yet the majority does exactly that by rejecting the Forest Service's soil analysis field checks and its observations and historical data in treated old-growth forests. The majority's rationale cannot be reconciled with our case law requiring "[d]eference to an agency's technical expertise and experience," particularly "with respect to questions involving engineering and scientific matters." *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir.1989).

See also Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853, 871(9th Cir.2004) (reversing a district court decision that certain alternatives violated NEPA because of inadequate deference to the agency's expertise).

Because the majority's analysis cannot be squared with the deferential review required of us, I respectfully dissent.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35995
D.C. No. CV-03-00018-DWM

ECOLOGY CENTER, INC.,

Plaintiff - Appellant,

v.

DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; et al.,

Defendants - Appellees,

MINERAL COUNTY; et al.,

Defendant-Intervenors-Appellees.

JUDGMENT

Appeal from the United States District Court for the District of Montana (Missoula).

This cause came on the be heard on the Transcript of the Record from the United States District Court for the District of Montana (Missoula) and was duly submitted.

Appendix A

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED, REMANDED**.

Filed and entered 12/08/05

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION FILED NOVEMBER 4, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CV 03-18-M-DWM

THE ECOLOGY CENTER, INC.,

Plaintiff,

vs.

DEBORAH L.R. AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; and, UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture.

Defendants.

I. Introduction

In 2000, approximately 74,000 acres of the Lolo National Forest burned. The United States Forest Service has developed a Lolo Post Burn Project for logging and road construction activities on approximately 4,600 acres. The Record of Decision (ROD) and the Final Environmental Impact Statement (FEIS) for the project were released in July,

2002, Plaintiff The Ecology Center opposes this project, which proposes to log 35.2 mmbf, construct 1.7 miles of new road, and reconstruct 287 miles of extant road. The acres at issue include both burned and unburned forest.

This action challenges the defendant's final approval of these timber sales, The Ecology Center maintains that the approval is illegal under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4370, the National Forest Management Act (NFMA), 16 U.S.C. § 1600-1614, and the Administrative Procedures Act (APA), 5 U.S.C. § 501-706. These are final agency actions or unreasonable failures to act under the APA. Plaintiff's Complaint includes five claims: first, the Project fails to comply with the Forest Plan and does not insure viability of species in compliance with NFMA; second, the project does not insure that soils will be conserved; third, the FEIS is legally inadequate in violation of NEPA; fourth, the LNF is violating NFMA by implementing an outdated Forest Plan; and fifth, the Forest Service is violating NEPA by failing to produce a supplemental EIS for the LNF Forest Plan, Compl., 24-33.

This Court denied Plaintiff's motion for a preliminary injunction on February 25, 2003. There are now three motions for summary judgment before the Court. There is also a motion by Defendant to strike the Declarations of Jeff Juel and Sara Jane Johnson (dkt # 43) and a motion by Plaintiff to strike portions of the Administrative Record (dkt # 44).

The legal questions facing the Court are whether, under NFMA, the Forest Service is meeting its duty to insure the viability of the black-backed woodpecker (BBW) and other

species, and under NEPA, whether the Forest Service took a hard look at the impacts of this project on these species and old growth forests.

II. Analysis

A. Plaintiff's Argument[1]

Plaintiff raises two main arguments against the Lolo Post-Burn Plan in support of its motion for summary judgment[2]: the Lolo NF is not insuring the viability of old growth-dependent species, and the Lolo NF is not insuring soils productivity, both of which are duties imposed by the National Forest Management Act. 16 U.S.C. § 1604(g) (3) (B) & (E).

Plaintiff's old growth argument has two aspects, First, logging in old growth habitat adversely impacts old growth species. Plaintiff decries the Forest Service's apparent focus on the tree component of old growth, rather than on the broader habitat characteristics, including a multi-stored forest. Br., 6. In addition, the Forest Service's own experts have repeatedly pointed out that the LNF is short on snags, which is part of the required habitat of pileated woodpeckers. Br., 10-11. Therefore, the LNF conclusion that logging in these areas will not impact pileated woodpeckers is arbitrary.

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1. Counsel for all parties are advised to read Local Rule 56. No party has fully complied with its requirements.

2. Plaintiff failed to comply with L.R. 56.1(a) and (b), or, in the alternative, (c), and L.R. 10.4(a).

Second, the LNF is not insuring the viability of black-backed woodpeckers (BBWP). The BBWP relies on post-burn habitat. The Lolo NF is lacking in such habitat. Therefore, Plaintiff argues, logging in the very habitat that these birds rely on fails to insure the viability of the species. Br., 16. Plaintiff further argues that the Forest Service's protection of pileated woodpeckers does nothing to protect the BBWP, and therefore the LNF needs to develop a specific conservation plan for the BBWP. Br., 17.

Plaintiff's second major argument is that NFMA imposes a duty on the Forest Service to insure that timber harvest will not irreversibly damage soil conditions, and that the LNF has not met that duty here. Br., 18, Plaintiff criticizes the lack of a LNF specific soil standard in the Forest Plan, and especially, the FEIS plan to collect soils data after project approval. FEIS, 3-126; Br., 19-20. Plaintiff's brief refers to the Declaration of Jeff Juel as an "expert analysis" and an "aid to understanding." Br., 18.

C. Defendants' Argument

Defendants argue that the Lolo Project complies with both NFMA and NEPA, and therefore summary judgment should be granted in their favor,

1. NFMA Claims

Defendants argue that the LNF took a hard look at the impact of this project on the various species at issue, and therefore the project complies with NFMA's species viability requirements. Goshawks, pileated woodpeckers and black-

backed woodpeckers are the Forest Service's species of concern on the Lolo NF. Br., 1. The Forest Service cites extensively from the administrative record to demonstrate how considerations of these species were formulated and supported by analysis. Br., 2-6. Defendants emphasize the acreage amounts of affected territory compared to the amounts of habitat available throughout the forest, In addition, Defendants argue that suitable measures are being taken or are planned, such as monitoring and treatment options, that sufficiently limit the impact of the project on these species. This determination, Defendants argue, is due considerable deference.

Defendants' second argument addresses the issue of old growth and snag protection. Defendants argue that the Post Burn Project will enhance old growth on the Forest, a contention that Plaintiff hotly disputes.[3] Br., 6. The administrative record contains information demonstrating, Defendants argue, the usefulness and success of similar old growth enhancement projects. Br., 7; AR 48: AA-1-AA-17; AR 38-375. In addition, the snag standards are being met, Br., 12.

Defendants address the argument about NFMA's soil requirements by reference to their preliminary injunction brief. Br., 13.

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3. Perhaps too hotly. At Page 8, Defendants point out that Plaintiff deleted language from the Hillis article to exclude what might be the most pertinent phrase, changing "Stand structure is now predominately single-storied and likely resembles historic conditions, which represents a change from the multi-storied pre-treatments stand." By deleting the bolded language, Plaintiff's counsel significantly changes the implication of the sentence and undermines the credibility of the Plaintiff's case.

Appendix B

Defendants next address Plaintiff's fourth and fifth claims, both of which assert that the LNF's continuing management of the forest without an amended forest plan or without supplementing the Plan's EIS is a violation of the law. Br., 13. Defendants argue that revision or amendment is discretionary. Br., 14; 16 U.S.C. § 1604(a); 36 C.F.R. § 219.10(f)&(g). Therefore, Defendants argue, this Court does not have jurisdiction under NFMA to hear Plaintiff's allegation of failure to amend, since there is no final agency action giving rise to an APA claim, Defendants also argue that, as a matter of recent law, the Forest Service is not in violation of NFMA because its plan has expired. Br., 14, FN17; Pub. L. No. 108-7, § 320, 117 Stat. 11 (Feb. 20, 2003).[4]

2. NEPA claims

Defendants argue that the LNF took the requisite "hard look" at the impacts of the Lolo Post Burn Project. Br., 16. The FEIS analysis supports the LNF's need for fuel reduction, not to reduce the risk of future fires occurring, but rather, to

4. Section 320 reads, "Prior to October 1, 2003, the Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f) (5)(A)of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604 (f) (5) (A)) solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System. Nothing in this section exempts the Secretary from any other requirement of the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1600 et seq,) or any other law *Provided*, That if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise a plan for a unit of the National Forest System, this section shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis."

reduce the duration and intensity of those future fires. Br., 17.

The LNF also took a hard look at insect predation issues, Defendants argue. Br., 17-18; FEIS 1: 8, 2: 73, 3:142-43, 152-55; 4-96-98.

D. Intervenor's Argument

Intervenors' arguments are similar to the Defendants'. Intervenors argue that there is sufficient evidence in the record to conclude that the Forest Service considered the impacts of this project on the pileated and black-backed woodpeckers and on the goshawk. Br., 5-7. Further, Intervenors disagree with Plaintiff's characterization of the sensitive or old growth-dependant nature of these three species. Br., 7.

Intervenors point out that the management objectives of NFMA require a multiple use approach to forest management; the Forest Service is not in violation of NFMA if it chooses an alternative that is not the absolute best for species viability, *Seattle Audubon Society v. Mosley*, 80 F.3d 1401 (9th Cir. 1996); Br., 7

Next, Intervenors attempt to distinguish *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002), and *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002), upon which Plaintiff relies heavily, from this case. Br., 8-9.

Intervenors then address Plaintiff's soils claims. Intervenors argue that the Lolo Project was designed to minimize the impacts of the project on soils. Br., 9-11; 1 AR A-3: FEIS 3-25; 15 AR M-79. Further, the Forest Service has acknowledged that salvage sales may have a negative impact on soils; NEPA does not require more than a consideration of impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); Br., 12.

Finally, Intervenors argue that even if this Court determines that the Lolo Post Burn Project is in violation of the law, the Court should not automatically impose an injunction but should instead entertain briefing on the equities of such an injunction. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995) ; Br , 13-15. Intervenors detail the harms to the community and the potential environmental harms that could result from enjoining these sales.

E. Analysis

Pursuant to Rule 56(c), Fed.R.Civ.P, summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The moving party must establish that no genuine issue of material fact exists. A material fact is one which is relevant to an element of a claim or defense, and its materiality is determined by the substantive law governing the claim or

defense. *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987), Once a moving party meets its burden that no genuine issues of material fact exist, the burden shifts to the party opposing summary judgment to show specific material facts which remain at issue, *Kaiser Cement Corp. v. Fischback & Moore*, 793 F.2d 1100, 1103-1104 (9th Cir. 1986).

When reviewing agency action, this Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (citations omitted.) "When evaluating a motion for summary judgment, the court views the record evidence through the prism of the evidentiary standard of proof that would pertain at a trial on the merits." *Eli Lilly & Co. v. Barr Laboratories*, Inc., 222 F.3d 973, 980 (Fed. Cir., 2000.) Judicial review of agency decisions under the Administrative Procedure Act allows the Court to overrule agency action only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court must defer to the Forest Service if its decision is "fully informed and well-considered." *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (quotations and citation omitted).

Plaintiff has questioned the adequacy of the Forest Service's conclusions on scientific issues but has not carried the burden of demonstrating that the Forest Service's conclusions were contrary to law. NEPA requires the Forest Service to take a hard look at the impacts of its project.

Appendix B

Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1376 (9th Cir. 1998). The record demonstrates that the Lolo National took the requisite hard look at the impacts of this project on both the animal species at issue, and on old growth and soil conditions

The Post Burn Project evaluates current and historical soil conditions on the Lolo National Forest and identifies the predicted impacts of the Project on those conditions. FEIS 3-31-32; 3-35-48. Further, the Forest Service proposed mitigation and monitoring plans to follow up on the results of the project. FEIS: 2-36; 2:41-42; 2:61-62.

The Forest Service considered the impacts of this project on the goshawk, pileated woodpecker, and black-backed woodpecker. The Forest Service concluded that the proposed activities would have no cumulative negative impacts, based on the evidence in the record before the agency. FEIS 4-117; 4-119; 4-123; 4-125.

Plaintiff criticizes the Forest Service's analysis of the goshawk, but the Forest Service has surveyed for the birds. FEIS:3-186-87. They are not known to live in the project area. In addition, the fires themselves would have done damage to goshawk habitat. FEIS: 3-187. The Post Burn Project activities will not impact goshawks, were they extant, any more than the fires already have. FEIS: 2-78; Map 3.18.12.

Likewise, the Lolo Post Burn FEIS sufficiently considers the impact of the project on both the black-backed woodpecker (FEIS: 2-78; 3-187-89; Maps 3.18.13a & b,

4.13.16a & b, and 4.13.17a & b) and the pileated woodpecker. (FEIS: 2-79; 3-192; Maps 3.18.15a & b, 4.13.20a & b, 4.13.21a & b.)

Plaintiff repeatedly disputes management decisions of the Forest Service, including what Plaintiff sees as the Forest Service's misguided fire policy, the Forest Service's approach to old growth habitat management (Br., 8-9), and the LNF's choice of scale for its consideration of soils impacts (Br., 20), among other things. This Court is not in a position to settle scientific disputes. Plaintiff's own argument in support of its view is not always unequivocal. For example, Plaintiff quotes a 2000 guidance paper on biodiversity (Pfister et al.) that states, in part, "opinions of well-qualified experts vary in this regard." Br., 9, Further, on the soils issue, there is no apparent reason why a soils assessment, based on geological conditions that are more or less unchanging on a landscape scale, should be conducted in the same manner or on the same scale as a wildlife evaluation. Soils do not require habitat. See Pl.'s Br., 20 (comparing Management Indicator Species monitoring with soil monitoring.) If opinions of experts conflict, as the record before the Court suggests, the Court defers to the expertise of the agency. While the Court need not forgive "a clear error of judgment," neither may the Court substitute its own judgment for that of the Forest Service. *Citizens to Improve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). Plaintiff's motion for summary judgment is denied.

Appendix B

III. Motion to Strike Declarations

Defendants moved to strike the two declarations attached to Plaintiff's summary judgment brief and the portions of Plaintiff's argument that rely on them. Defendants argue that this Court's scope of review for agency action allows only consideration of the record before the decision-maker. Whether the agency's decision was legal must be determined by review of the agency's record. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); Def.'s Br., 2. Under limited exceptions, the Court may consider documents outside of the administrative record. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). Such extra-record evidence is permissible in four circumstances: 1.) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, 2.) when the agency has relied on documents not in the record, 3.) when supplementing the record is necessary to explain technical or complex matters, and 4.) when Plaintiffs make a showing of agency bad faith. *Northcoast Environmental Center et al. v. Glickman*, 136 F.3d 660, 665 (9th Cir, 1998) (citing *Southwest Center*, 100 F.3d at 1450).

Defendants claim that Plaintiff's declarations do not fall within any of these exceptions (Br., 4) and that Plaintiff is trying to turn an administrative review case into a battle of the experts. Br., 5.

The agency is entitled to deference to its decisions based on its expertise. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1988); Br., 6. Because Plaintiff's

declarations do not fall within any exemption, the motion is granted and the declarations shall be stricken.

IV. Motion to Strike Portions of the Administrative Record

Plaintiff moved to strike the portions of the administrative record submitted by the Forest Service that were not before the agency at the time the disputed decisions were made. In particular, Plaintiff objects to the "Forest Inventory and Analysis" in Volume 48,

The Government responds that Plaintiff failed to comply with Local Rule 7.1(c), which requires a brief to be submitted with a motion. In addition, Defendants respond that Plaintiff only identified one document, which is a synopsis of forest survey information from 1995 and 1996; this information would have been available to the decision-maker at the time of decision.

Plaintiff's motion is inadequate and therefore is DENIED, The sole document specifically mentioned does appear to have been available, in some form, to the decision-maker. In addition, Plaintiff's motion fails to comply with L.R. 7.1(c). Under L.R. 7.1(i), such motions may be subject to summary ruling.

Therefore, for the foregoing reasons, it is HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (dkt #32) is DENIED;

2. Defendants' motion for summary judgment (dkt #34) is GRANTED;

3. Intervenors' motion for summary judgment (dkt #40) is GRANTED;

4. Defendants' motion to strike (dkt #43) is DENIED;

5. Plaintiff's motion to strike (dkt #44) is DENIED.

Dated this 4th day of November, 2003.

s/ Donald W. Molloy
DONALD W. MOLLOY, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 8, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-35995

D.C. No. CV-03-00018-DWM
District of Montana,
Missoula

ECOLOGY CENTER, INC.,

Plaintiff - Appellant,

v.

DEBORAH AUSTIN, in her official capacity as Forest Supervisor for the Lolo National Forest; BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture,

Defendants - Appellees,

MINERAL COUNTY; TOWN OF SUPERIOR; ST. REGIS SCHOOL DISTRICT NO. 6; SUPERIOR SCHOOL DISTRICT NO. 3; MONTANA COALITION OF FOREST COUNTIES; TRICON TIMBER,

Defendant-Intervenors - Appellees.

Appendix C

ORDER

Before: B. FLETCHER, McKEOWN, and GOULD, Circuit Judges.

The panel has voted to deny the petitions for panel rehearing submitted by defendant-appellees Deborah Austin and the United States Forest Service and defendant-intervenor-appellees Mineral County, Town of Superior, et al. Judges McKeown and Gould have voted to deny these parties' petitions for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the petitions for rehearing en bane and no gidge has requested a vote on whether to rehear the matter en Banc. Fed. R. App. P. 35.

The defendant-appellees' and the defendant-intervenor-appellees' petitions for panel rehearing and petitions for rehearing en bane are **DENIED.**